IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 307

IN THE MATTER

of

HAROLD SACHER, also known as "HARRY" SACHER, and ABRAHAM J. ISSERMAN,

Attorneys.

HAROLD SACHER, also known as "HARRY" SACHER, an Attorney,

Petitioner,

and

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and NEW YORK COUNTY LAWYERS' ASSOCIATION,

Respondents.

OPPOSING BRIEF FOR RESPONDENTS ON APPLICATION FOR A WRIT OF CERTIORARI.

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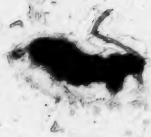

INDEX.

Table of Cases.

Statutes and Rules.

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POINT I.

No question of law requiring consideration by this Court is presented with relation to the sufficiency of the basis for permanent disbarment.

(See Petition, p. 7)

There was no dispute as to the facts; none was controverted by the petitioner.

The sole issue before the District Court and the Court of Appeals was the conclusion of fact which was to be drawn from the admitted acts of the petitioner, and the extent of discipline to be applied.

A. The Petitioner's Misconduct.

The conduct of the petitioner resulting in his disbarment, which he now seeks to have this Court review, led the Court of Appeals to the conclusion of fact that

> "It is evident that the respondent either was unable to comprehend his obligations to a court of law or was unwilling to fulfill them when he felt it inexpedient to do so" (Tr. 281).

There can be no doubt that this was warranted by the uncontroverted evidence. Even the Circuit Judge who dissented from the affirmance of the disbarment order had previously, in dissenting from the conviction of the petitioner for contempt, characterized the conduct of petitioner as follows:

> "To one schooled in Anglo-Saxon traditions of legal decorum, the resistance pressed by these appellants [of whom the present petitioner was one] on various occasions to the rulings of the trial judge necessarily appears abominable" (*U. S.* v. *Sacher*, 182 F. 2d 416 at 463).

In his current dissent this judge points out that he then limited his judgment "to the one series of incidents arising out of trial rulings" (Tr. 290, n.7). It cannot be conceived that even the dissenting judge considered the constant baiting of, and disrespect for the trial court, in which the petitioner had indulged over a period of some eight months,

any less execrable than the arguments and protests against rulings which he described in the language quoted above.

This Court has likewise had occasion to pass upon petitioner's conduct. In affirming the conviction of Sacher for contempt the majority of the Court, by Mr. Justice Jackson, referred to it as

> "* * * not * * * an isolated instance of hasty contumacious speech or behavior, but * * * a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous. The nature of the deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial." (*Sacher* v. *U. S.*, 343 U. S. 1, 5).

The seriousness of the offending conduct was reflected in the concluding words of the opinion, viz.:

> "[This Court] will also protect the processes of *orderly trial,* which *is the supreme object of the lawyer's calling*" (*ibid.*, at p. 14; emphasis supplied).

What this Court then said, based upon the summary conviction, has been fully justified by the proceedings before a judge who had not previously participated in any of the proceedings. It is to be remembered that the present petitioner had full opportunity to be heard and to introduce evidence;* he refrained from doing so, manifestly with the intent of avoiding being subjected to cross-examination.

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* For the sake of accuracy, it should be noted that Rule 5 of the Rules of the District Court for the Southern District of New York, quoted by petitioner (Pet., p. 23), did not become effective until March 1, 1952. When this proceeding was commenced and disposed of by the District Court, the rule relating to disbarment was Rule 4, of which the only applicable portion is:

> "Any member of the Bar of this court may be disbarred, suspended from practice for a definite time or reprimanded for good cause shown, after opportunity has been afforded to such member to be heard."

The Court of Appeals has found Mr. Sacher wanting in the supreme object of his calling, as stated by this Court in the above quotation, saying

> "• • • that the proved instances of unprofessional conduct, constantly repeated in the face of the court's admonitions, and continuing during a trial of extended duration, clearly demonstrated a lack of respect for the court and constituted a serious obstruction to the administration of justice." (Tr. 281).

Petitioner asserts (pp. 7-8) that "the decision below is in conflict with the decisions of this Court and of other federal courts," but he does not show wherein the alleged conflict lies." A brief consideration of the cases cited by him will demonstrate that he is merely attempting, without basis, to bring the case within one of the general reasons for the granting of *certiorari*.

Bradley v. *Fisher*, 13 Wall (80 U. S.) 335, is clearly not in conflict, as will appear from the discussion of that case hereafter (p. 6, *infra*). The same is true of *In Re Doe*, 95 F. 2d 386, (p. 8, *infra*).

In *In Re Patterson*, 176 F. 2d 966, the Court announced "The principles properly applicable and applied by" it, one of which was that

> "The scope of appellate review in disbarment proceedings is limited to the inquiry whether there was an abuse of discretion or grave irregularity."

The question there decided was whether in view of the nature of the offense the lower court had abused its discretion.

Costigan v. *Adkins*, 18 F. 2d 803, *In Re Watt & Dohan*, 149 Fed. 1009, *Smith's Appeal*, 179 Pa. 14, and *Matter of Robinson*, 140 App. Div. (N. Y.) 329, [the last two not being decisions of a federal court] dealt with the gravity of the wrong, as did *United States* v. *Hicks*, 37 F. 2d 289; in the last named case, the primary ground of the decision was that the attorney had not had proper notice of the charges against him.

United States v. *Costen*, 38 Fed. 24, was a Circuit Court decision disbarring an attorney for disloyalty to his client.

Clearly, the decisions cited by petitioner do not present even an apparent conflict "on the same matter" or on an "important question of federal law" (Rules of this Court, No. 38).

B. The extent of the discipline imposed on petitioner is not in conflict with any principle of law or with other decisions.

(See Petition, p. 14)

The petitioner is now asking this Court, as a matter of law, to hold that a Court may not disbar one of its practitioners (a) unless his offense involved " 'moral turpitude' or 'venality or lack of fidelity to * * * his clients' "; or (b) unless his offenses were repeated in separate trials, even though such offenses were ofttimes repeated in a "single" trial; or (c) if the attorney's previous record had been "unblemished"; or (d) if, in the course of later trials, held while the charges were pending against the attorney, he demeaned himself properly (Petition, p. 7).*

Manifestly no such principle of law exists, and none of the authorities cited in support of the petition sustains it.

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* Certainly, an attorney threatened with disciplinary action will, for the time being, comport himself with the utmost circumspection; the fact that Mr. Sacher was capable of demeaning himself properly merely adds force to the factual conclusion that "he was unwilling to fulfill" his obligations to the Court "when he felt it inexpedient to do so." (See p. 2; *supra*).

It should be observed that petitioner has attempted to establish his proposition by carefully selected quotations, separated from context. We shall not unduly expand this brief by attempting to comment upon all the cases cited. As, however, petitioner relies strongly on *Bradley* v. *Fisher*, 13 Wall (80 U. S.) 335, it is appropriate to consider that case briefly.

The Court was not there sitting in review of an order of disbarment. The question presented was whether the act of a judge in disbarring the plaintiff rendered the former liable in a civil action for damages; judgment in favor of the defendant was affirmed.

It is true that the Court there stated that the power of removal from the bar should be exercised only for

> "* * * most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession" (*ibid.*, p. 354; see Petition, p. 9).

The Court also stated that removal should not be decreed where a less severe "punishment" would accomplish the desired end (*ibid.*, 8). But *it did not establish any rule for ascertaining when the incompatibility existed, or when discipline short of disbarment would suffice*, except that the passage quoted by petitioner concerning adequate or excessive punishment was immediately qualified by the following, to which petitioner's brief does not refer:

> "But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers" (80 U. S. at p. 355).

The Court there held that the making of rude and insulting remarks and a threat of chastisement of the trial judge, made on one occasion only, immediately after the Court had recessed, "was ample ground for the action of the court" in summarily disbarring the attorney (*ibid.*, at p. 356).

Clearly, the holding in that case is contrary to the principle which petitioner seeks to have established.

See likewise, e.g., *Duke* v. *Committee*, 82 F. 2d 890, where disbarment was affirmed based on the attorney's having charged in the course of various motions that the trial judge was biased and had made a false bill of exceptions.

The decision of the Justices who opposed disbarment in *In Re Isserman*, 345 U. S. 286, to which petitioner refers (Pet., pp. 7, 13), is wholly inapplicable. It was a proceeding brought directly in this Court to disbar Isserman from the Supreme Court bar; it involved no appellate jurisdiction or question. This Court was there asked to disbar Isserman solely because he had been disbarred in the State Courts in New Jersey. The New Jersey Court had disbarred Isserman merely because of his conviction of contempt (even though the Federal Court which had been directly involved in the same proceeding in which it disbarred the present petitioner had disposed of the disciplinary charges against Isserman by a limited suspension); four of the justices favored disbarment; one justice did not participate, and the other four based their opinion in this Court on the proposition that

> "• • • this Court should not accept for itself a doctrine that conviction of contempt *per se* is ground for a disbarment" (*ibid.*, at p. 292).

No discussion is required to demonstrate that there is no parallelism to the instant case.

C. The Court of Appeals applied no erroneous rule as to the force or effect to be given to the decision of the District Court.

(See Petition, pp. 14, 16 *et seq.*)

Petitioner incorrectly states that one of the "Questions Presented" is "whether the Court of Appeals correctly held that the scope of its appellate review * * * was so restricted as to preclude reversal, even though 'a less severe measure of discipline might have been imposed' " (Pet. p. 2).

His premise is that the Court of Appeals concluded that disbarment was too severe a penalty, but erroneously regarded itself as precluded by the " 'abuse of discretion' test" from passing on the issue (Pet., p. 17).

The language of the Court of Appeals on which petitioner bases his contention (*id.*, p. 14) is as follows:

> "Even if a less severe measure of discipline might have been imposed, we do not find any abuse of discretion in disbarring the respondent from practice such as was found to exist in *In re Doe*, 2 Cir., 95 F. 2d 386. See *In Re Chopak*, 2 Cir., 160 F. 2d 886, 887, cert. denied 331 U. S. 835" [Tr. 281].

It is apparent that this was said to distinguish the Court's earlier decision in *In Re Doe*, and not as indicative that lesser discipline would have sufficed here. This is emphasized by the fact that in the *Doe* case, and in express language in the *Chopak* case, *supra*, the Court recognized that there could be an "abuse of discretion in the discipline imposed."

In any event it is well settled that in disbarment proceedings

> "What measure of discipline should be meted out rested in the sound discretion of the District Court."

In Re Chopak, 160 F. 2d 886, 887, cert. denied, 331 U. S. 835.*

Likewise, in *Tulman* v. *Committee*, 135 F. 2d 268, the Court of Appeals of the District of Columbia, in a *per curiam* opinion (one of the judges being the late Mr. Chief Justice Vinson) said:

> "[Appellant's] explanation in palliation was necessarily submitted to the consideration and decision of the Trial Court, and it cannot be doubted that that Court, in denying effect thereto, exercised its judicial discretion, which is not subject to review in this Court. And to this we add that were it subject to review, we should approve it."

That language might well have been written in the instant case.

See also,

In re Patterson, supra, p. 4.

Again the petitioner asserts that there is a conflict "with decisions of the courts of appeals of other circuits, and, indeed, with an earlier decision in the Second Circuit" (Petition, p. 14) with respect to the scope of appellate review. We have already considered the *Patterson*, *Costigan*, *Hicks* and *Doe* cases (pp. 4, 5 and 8, *supra*).

The other cases claimed to be conflicting are:

In Re Fisher, 179 F. 2d 361, directly involved abuse of discretion, to which the court referred.

Dorsey v. *Kingsland*, 173 F. 2d 405, reversed, *sub nom. Kingsland* v. *Dorsey*, 338 U. S. 318, in which this Court

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* In that case there was a dissent by the same Circuit Judge who dissented in the intant case, who there expressed the opinion that "three years' suspension does, however, suggest the vengeful," as, in the case at bar, he regards the action of the Court to be controlled by "vindictive harshness" (Tr. 291).

affirmed the judgment of the District Court, 69 F. Supp. 788, where it was held that the action of the Commissioner of Patents in disbarring a patent attorney would not be disturbed in the absence of a finding of abuse. It is beyond understanding why the petitioner cites the Court of Appeals decision as supporting his thesis, and seeks to dispose of the decision of this Court by the obviously incorrect statement that the reversal was "on other grounds" (Petition, p. 14).

Bartos v. *United States District Court*, 19 F. 2d 722, where an attorney was suspended for having illegally made beer for his private use, for which he had been convicted. The court adverted to the fact that he had not been convicted of a felony, and held that it had "no regulatory power over the private life of members of the bar."

Finally, *Barnett* v. *Equitable Trust Co.*, 34 F. 2d 916, was not a disbarment proceeding; it was there held that an award of damages in an amount which was not "within permissible limits" was an abuse of discretion.

Here, again, it is obvious that the petitioner's citations do not indicate even a semblance of conflict with the decision at bar.

It follows that petitioner has not indicated the existence of any question of law with respect to the finding that petitioner, as an officer of the Court, had misconducted himself and the conclusion that he should be disbarred.

POINT II.

No question of law, requiring consideration by this Court, is presented with relation to Petitioner's application for rehearing and suggestion that such rehearing be en banc.

(See Petition, p. 18.)

The petitioner appeared *pro se* until after his time to apply for rehearing had expired pursuant to the rules* (Petition, p. 5, n.4).

The opinion was filed on July 6th (Tr. 303). On July 20th he applied for and was granted a stay of the issuance of mandate pending application to this Court for *certiorari* (Tr. 295). On July 31st petitioner retained his present attorney, and on August 6th he petitioned for rehearing *en banc*.

A suggestion that the Court sit *en banc* had never previously been made by the petitioner. When he did make the suggestion, through his recently retained attorney, they knew that the Court of Appeals had already acted adversely upon the question of whether the issues presented by the appeal should be heard by the full Court. The following had appeared in the dissenting opinion:

> "* * * on the appearance of *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U. S. 247, 260, 274, with at least an implication of criticism of our practice of never sitting *en banc*, it seemed to me that an issue appropriate to be disposed of by the full

* Rule 28 of the Court of Appeals provides that "A petition for rehearing may be filed within fifteen days from the filing of the opinion of this court in the clerk's office." The Court of Appeals dealt with the application on the merits, and we make no point with regard to petitioner's default; it is recited merely as a historical fact.

bench was here presented. Accordingly *I asked the Chief Judge to poll the court, which he did; of the active judges available to sit in this case, three voted against sitting en banc and two for it.* Consequently my request was not given effect; and decision here, involving, as I believe, errors of law and of fact, is by only a minority of the Court." (Tr. 284; emphasis supplied.)*

We submit that the facts establish that the belated application of petitioner for hearing *en banc* was not made in good faith.

In any event, as the Court had indicated that it did not desire to sit in full upon the issues involved in the appeal, whatever occurred thereafter could not give rise to any question which was not purely academic.

Petitioner's attempt to explain away the effect of the prior determination not to sit *en banc* (Pet. p. 21, n.26) is a manifest sophism. As the members of the Court of Appeals then had the *Western Pacific* decision before them, they *could not* "have considered themselves 'powerless to act'", nor that one of their own members "was not authorized to initiate" the proceeding.**

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* It is, of course, true that wherever a controversy is determined by "a division of not more than three judges" [28 U. S. C. 46(c)] and one judge dissents, the decision is by a minority of the full court, if there are five or more circuit judges. Nevertheless, it is the decision of the court.

** It is to be noted that all the judges who considered the question of sitting *en banc* were familiar with the nature of the issues involved. Judges A. N. Hand and Clark sat in the instant case and had passed on the appeal in the *Becker* contempt case (182 F. 2d 416); Judge Chase sat in the present case and had participated in the appeal from the *Dennis* conviction, where the misconduct of the present petitioner had been considered (183 F. 2d 201); Judge Frank had sat in the contempt case, and Judge Swan in the *Dennis* appeal. Judge L. Hand, who was no longer "active", was one of the bench which heard the *Dennis* appeal.

Furthermore, as the Court rules* forbid any rehearing "unless a judge who concurred in the opinion desires it", and this condition was not fulfilled, it is futile to consider whether, had a rehearing been granted, it should have been conducted in any particular manner.

Finally, on this phase of the subject, it must be noted that the *Western Pacific* case (345 U. S. 247), is without application. The error of the Court of Appeals in that case lay in their refusal to consider the merits upon the erroneous assumption that it was without authority in law to do so (*ibid.* pp. 264-6). No such error was committed in the instant case.

In short, petitioner is attempting to have this Court pass on a mere abstraction without any intimation that the Court of Appeals erroneously deprived him of any right or remedy.

Conclusion.

In his "Conclusion" petitioner refers to "the frequent unavailability of counsel to represent individuals accused of unlawful subversive activities," with the obvious innuendo that the character of his clients influenced the action of the court in disbarring him. He further urges that if his disbarment is allowed to stand "the consequences must be to magnify contemporary hazards to the integrity and dispassionateness of the American bar." (Pet., p. 22.) It requires no argument to establish that petitioner was dealt with as any lawyer who had transgressed as he had would have been, or that the order of disbarment is necessary if "the integrity and dispassionateness of the American bar" is to be preserved. Indeed, his conclusion is in effect a plea that a more lenient rule of conduct be applied to attorneys in "unpopular causes" than to those in ordinary cases. We do not believe this to be the law.

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* Rule 28, Court of Appeals, 2nd Circ.

The District Court has, after a full and fair hearing, exercised the power of disbarment which is "incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession". (*Ex parte Burr*, 22 U. S. 529, 530.) It has exercised its function of internal management *vis a vis* its bar, after a full consideration and determination of the facts. The Court of Appeals has exercised its power of review, and affirmed the order of the lower court. No adequate reason has been shown for the interposition of this Court.

The petition for a writ of certiorari should be denied.

Dated: N. Y., Sept. 28th, 1953.

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